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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

Office Supreme Court
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JAMES H. McKE

CHARLES E. YATES, ET AL., *Plaintiffs in Error,*
vs.
JONES NATIONAL BANK, *Defendant in Error.* } No. 230

CHARLES E. YATES ET AL., *Plaintiffs in Error,*
vs.
UTICA BANK, *Defendant in Error.* } No. 231

CHARLES E. YATES, ET AL., *Plaintiffs in Error.*
vs.
THOMAS BAILEY, *Defendant in Error.* } No. 232

CHARLES E. YATES ET AL., *Plaintiffs in Error,*
vs.
BANK OF STAPLEHURST, *Defendant in Error.* } No. 233

ERROR TO THE SUPREME COURT OF NEBRASKA

BRIEF OF DEFENDANTS IN ERROR UPON THE SEVERAL MOTIONS TO DISMISS OR AFFIRM.

CHARLES L. BURR.
LIONEL C. BURR,
Attorneys for the Motions.

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ERROR TO THE SUPREME COURT
OF NEBRASKA

BRIEF OF DEFENDANTS IN ERROR UPON THE SEVERAL MOTIONS TO DISMISS OR AFFIRM.

Brief of Defendants in Error upon the several motions to Dismiss or Affirm.

May It Please the Court:

A motion to dismiss or affirm has been filed and duly served on plaintiffs in error in each one of the above entitled cases. We only print a copy of the motion in case No. 230. It is as follows:

Motion to dismiss the writ of error in this action, or to affirm the judgment of the Supreme and District courts of Nebraska.

Comes now the defendant in error by its counsel appearing in that behalf and moves the court to dismiss the writ of error in this action, to the Supreme court of the state of Nebraska for the following reasons, to-wit:

1. The petition of the defendant in error did not in the record specially allege, set up or claim a federal right or federal law, or a federal question, nor did the defendant now the plaintiff in error, specially allege a right, privilege or immunity in or by their said answer.

2. The separate answer of the defendant, now plaintiff in error, did not allege specifically, set up or claim herein, a federal right, claim, privilege, immunity or a federal question, nor did plaintiff in error specially plead or claim any right, privilege or immunity of a federal nature as belonging to him, nor did he specially set up, or base any claim, right, privilege or immunity at the trial or in the record, at the proper time in the proper way.

3. The Supreme court of the state of Nebraska, nor the district court in which said action was tried, did not decide a federal law necessarily involved in this action upon

which the recovery of judgment by the defendant in error against the plaintiff in error, depends.

4. The circuit court of the United States for the District of Nebraska, duly remanded said action from the circuit court of the United States for the District of Nebraska to the district court of Seward county, Nebraska, on two separate occasions and each one of said orders are final and conclusive, and this court has no jurisdiction to review or revise said orders of remand.

5. The state court did not decide a federal question but expressly held it was not necessary so to do, and rested its decision on the independent ground of construing the petition to state a cause of action for fraud and deceit, which decision of the state court is broad enough to maintain the judgment now complained of, nor did the answer to plaintiff in error, nor the motion for a new trial, allege or set up a right, privilege, or immunity under a federal law at the proper time in the proper way.

6 Both the circuit court of the United States for the District of Nebraska, and the circuit court of appeals for the Eighth circuit have in this action between the same parties held, that the original and amended petitions do not allege or set up a federal question, and the same has become the law of this case and this court has no jurisdiction under section 2 of the act of March 3, 1887, to review the same.

The Supreme court of the United States has no jurisdiction either of the subject matter or of the parties to this action.

And said defendant in error by counsel as aforesaid also moves the court to affirm the said judgment from which

said errors purport to have been taken, because although the record may in some manner show that this court has jurisdiction in the premises, yet it is manifest that said error proceedings are prosecuted for delay only.

JONES NATIONAL BANK,
By CHARLES L. BURR,
LIONEL C. BURR,
Its Attorneys.

Lincoln, Nebraska, February 20th, 1907.

Received copy of the above motion together with copy of brief on motion.

DAVID E. THOMPSON,
CHARLES E. YATES,
ELLIS P. HAMER, Deceased.
By J. W. DEWEESE,
FANK E. BISHOP,
HALLECK F. ROSE,
Their Attorneys.

This action was originally commenced in the district court of Seward county, Nebraska, and by plaintiffs in error removed, on two different occasions, to the circuit court of the United States, for the District of Nebraska, and upon motion of defendant in error duly remanded each time. After the action had been remanded to the state court for the first time, defendant in error by leave of the state court, amended its petition, by interlination, and plaintiffs in error removed the action again for the second time. The circuit court held the last removal good (Record No. 230, 66 to 71) but upon appeal to the circuit court of

appeals for the Eighth circuit, the action was for the second time remanded. Jones v. Mosher et al., 107 Fed. 561. Also see Bailey v. Mosher et al., 74, Fed. 15. And this brings us to the first point made in the motion to dismiss or affirm, namely, that the action having been twice remanded from the federal to the state court, this court has no jurisdiction to review the several orders to remand, or of the parties or subject matter of this action.

The last part of section 2 of the act of March 3rd, 1887, reads as follows:

"When any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

We view this important language in this law, as applied to the two orders remanding this action, the same as any final order or judgment in either state or federal court. Congress evidently intended that an order remanding an action back to a state court to be final, as to further proceedings, or jurisdiction in such action, precisely the same as the final order in the case at bar, from which plaintiff in error had a right to appeal from the district to the Supreme court, or from the final judgment in the Supreme court of the state of Nebraska, from which this court could issue its writ of error to the Supreme court of Nebraska.

If the two orders remanding this action to the state court are final, what right has plaintiff in error to complain

of same in the motion for a new trial, and what power, or jurisdiction, has this court to review either one of said final orders, which by this statute, passed on purpose to limit and restrict the jurisdiction of both the circuit court and of the parties to the action and Supreme court of the United States?

In re Pennsylvania Company 137, U. S. 454.

Birdseye v. Schaffer 140, U. S. 117.

Missouri Pacific Ry. Co. v. Fitzgerald 160, U. S. 556.

Gurness v. Patrick County 137, U. S. p. 141.

Richmond & D. R. R. Co. v. Thouron 134, U. S. 45.

Mr. Justice Bradley in the opinion in re Pennsylvania Co. on p. 454 in speaking of this statute, says:

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive.* * * Yet the use of the words "such remand shall be immediately carried into execution" in addition to the prohibition of appeals and writs of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process."

Again it has become the law of this case that no federal question was set up or alleged in the original petition, or in the amended petition in this action. The original petition is found on pp. 60 to 66, Record No. 230, and the petition to remove the case out of Seward county district court is found on pp. 66 to 70, Record No. 230.

It was held in this action by and between these same

parties by Oliver P. Shiras, judge of the United States district court for the Northern District of Iowa, sitting in this action, and by Thayer, circuit judge, in the circuit court of appeals for the Eighth circuit that neither the original petition nor the amended petition made any allegation of a federal nature, as persistently claimed in the answer in the petition to remove and in the assignments of errors, and now alleged and set forth in each one of said pleadings and records herein, and that neither the original petition, the amended petition or the proceedings in removal stated a case arising under the National Banking Act, but did state and allege a cause of action for fraud and deceit under the common-law, and in the case of Bailey v. Mosher et al. 74, Fed. 16, Judge Shiras in the opinion says:

"In Hayden v. Thompson, 17 C. C. A. 592, 71 Fed. Rep. 60, it was furthermore ruled by the same court that a person legally injured by the wrongful acts of the officers and directors of a national bank, and which acts create causes of action under the principles of the common-law, may count on the common-law liability for damages caused him. Actions of this character, however, would not present controversies arising under the laws of the United States, and of them the federal courts could have no jurisdiction, either originally or by removal, if they were between citizens of the same state. The petition in the case now before the court is clearly based, not upon the provisions of the National Banking Act, but upon a liability claimed to arise under the principles of the common-law; and, as the requisite diversity of citizenship does not exist to justify a removal on that ground, it must be held that the state court rightfully refused to order a removal of the case."

Thayer, circuit judge, held in Jones v. Mosher et al., in 46 C .C. A. 174, construing both the original and amended petition in this action:

"Applying this rule to the case in hand, the result is that if the amended complaint which was filed on May 3, 1897, stated substantially the same cause of action which was stated after it was amended by interlineation on March 16, 1899, then the second petition for removal was filed too late to oust the jurisdiction of the state court, and we need not concern ourselves with the question, whether either one of the complaints, original or amended, stated a cause of action arising under federal laws. If the interlineations made on March 16, 1899, did not change the nature of the cause of action which was counted upon by the amended complaint, then it is manifest, we think, that the defendants waived their right to remove the cause by failing to take any action looking to its removal for nearly two years thereafter. And this is so even if it should be conceded that the amended complaint differed from the original complaint in disclosing a federal question. We have made a careful examination of the complaint as it stood both before and after it had been changed by interlineation, and such comparison has satisfied us beyond a reasonable doubt that such interlineations as were made by leave of court on March 16, 1899, were unimportant and effected no change whatever in the cause of action. If the interlined complaint shows a right of action arising under the federal laws, then, beyond all controversy, the amended complaint before it was interlined showed a right of action of the same character; and the same statement may be made with reference to the original complaint of February 25, 1895, which, as the lower court held, did not disclose a federal question, but stated a cause of action at common-law for deceit. Bailey v. Mosher (C. C.) 74, Fed. 15. Realizing, apparently, that the second application for a removal of the cause was made too late, for the reasons already stated, counsel for the defendants have suggested that in as much as the original petition for removal, which was filed on March 29, 1895, remained on file, it operated proprio vigore to oust the jurisdiction of the state court as soon as the amended declaration was filed. This suggestion assumes, of course, that the second complaint differed from the first or original complaint as respects the cause of action stated therein, which assumption in our judgment is erroneous. We are unable to discover any difference in the cause of action stated in the two complaints. But aside from this

view of the case, we are of opinion that the original petition for removal was functus officio when the case was originally removed and remanded, and that it could not have any effect upon a subsequent amended complaint filed in the case, even if the latter did state a different cause of action arising under federal laws."

These authorities, together with the amended and original petitions, the petition to remove the action and the motions for a new trial, all clearly show that this court has no jurisdiction of this action, or the parties thereto, and that the contention of plaintiffs in error concerning the allegations of the original and amended petitions has been held by the law in this case against him, and if plaintiffs in error desired to have a federal right reviewed by this honorable court after the cases were remanded, they should have laid the proper foundation so to do, at the proper time in the proper way.

Second Point.

The state court did not decide a federal question, but expressly held it was not necessary so to do, and rested its decision on the independent ground, of construing the petition, to state a cause of action for fraud and deceit, following Shiras, judge, and Thayer, circuit judge, supra, which decision of the state court is broad enough to maintain the judgment now complained of, nor did the petition of defendants in error nor the answer of plaintiffs in error, nor the motion for a new trial, allege or set up a right, privilege, or immunity, under a federal law or a federal question.

"A suit cannot be one arising under the constitution, or

laws of the United States, until it has in some way been made to appear on the face of the record that some title, right, privilege or immunity upon which the recovery depends, will be defeated by one construction of the constitution, or a law of the United States, or sustained by an opposite construction."

Starin v. New York, 115 U. S. 248.

Germania Insurance Co. v. Wisconsin, 119 U. S. 473.

City of New Orleans v. Benjamin, 153 U .S. 411.

The judicial construction does not depend upon the validity of the claim set up under the constitution or the laws of the United States, but upon the fact, that the claim involves a real and substantial dispute or controversy in the suit.

Nashville and Cy. Ry. Co. v. Taylor, 86 Fed. 168.

St. Paul & M. Ry. Co. v. St. Ry. Co., 15 C. C. A., 167.

St. Joseph & G. Ry. Co. v. Steele, 167 U. S. 659.

A claim which in fact depends upon questions of local or geenral law is not within the jurisdiction, even though a reference to a federal statute is made.

St. Paul & Co. Ry. Co. v. St. Ry. Co., ubi supra.

The existence of a federal question must be shown upon the face of plaintiffs' declaration or bill, in order to give federal jurisdiction, and it cannot be established by a petition for a removal, answer or demurrer.

State of Indiana v. Oil Company, 85 Fed. 876.

Tennessee v. Union Planters Bank, 152 U. S. 454.

Pacific Co. v. Ellert, 64 Fed. 421.

Florida & Co. v. Bell, 87 Fed. 369.

Plaintiffs in error do not set up in their answer a claim, privilege, or immunity, belonging to them under any federal law which must appear by averments so distinct and positive as to place it beyond question, by a statement in legal and logical form, such as required by good pleading, that plaintiffs in error or that defendants in error in their petition intended to rely on the same.

The answer of the plaintiffs in error, in a certain way attempts to set up: First, a federal right in the defendants in error; second, a federal right, or claim of right, privilege, or immunity, in plaintiffs in error, in and to a certain judgment for costs of suit alleged to have been obtained in an action between the same parties pending in the circuit court of the United States for the District of Nebraska, but that said judgment for costs is a bar; third, payment of plaintiffs' claim; fourth, that necessarily from the allegations of fraud and deceit alleged in the petition, plaintiffs in error insist that the old common-law right and remedy for damages for false and fraudulent representations, the basis of the old common-law action for fraud and deceit, was abolished in the several states as to depositors and creditors, by the acts of Congress relating to national banks, and the damages sought to be recovered by plaintiffs, was an asset of the bank, its receiver, its stockholders or the general creditors of the bank. But that said assets belong to the bank, its creditors, its receiver, or its stockholders. Not to plaintiffs in error.

Charles W. Mosher, the president, and Richard C. Outcalt, the cashier, of said bank, also filed a separate answer

but they are not parties to the separate answer of David E. Thompson, nor to the separate and joint answer of Charles E. Yates and Ellis P. Hamer, appearing on pages 18 to 24, of Record No. 230, but it is necessary to go to the two answers last named to see the vast difference between what plaintiffs in error claim now in the assignment of errors in this court, and what they really claimed by their separate answers; by the instructions offered to the trial court to the jury; by any evidence introduced and by the motions for a new trial in the trial court.

These answers are substantially duplicates and set up the same defense. The first defense simply recites certain facts concerning the Capital National Bank, and that defendants were stockholders; that the bank was closed and a receiver appointed; that no forfeiture of the franchise of the banking association has ever been declared by the Comptroller of the Currency for any reason whatever. The third paragraph of the first defense mentions the duties and obligations of the several directors and stockholders of said bank which were such, and only such, as required by the "National Banking Act."

The fourth paragraph of the first defense denies that they signed or attested the reports referred to in the amended petition, or that they made, signed or altered any report, purporting to show the condition of said bank "for the purpose and in the manner alleged in the plaintiffs' said amended petition.'

The fifth paragraph of the first defense alleges:

"**That the cause of action set out in plaintiffs amended petition,** if any it has, is founded upon alleged facts, which

if true, constitute a violation by this defendant **as a director or stockholder of his duties as such director or stockholder** as laid down and defined in the National Banking laws of the United States above referred to. * * * That if any liability attaches to him as **director or stockholder** of said bank, or any act done, or duty neglected **as set forth in the amended petition,** or otherwise, that **such liability** is determined and controlled by the National Banking act **concerning the management of national banks** and that in determining the liability of this defendant, there is necessarily involved the construction of said banking acts **relating to the duties of directors and stockholders of said national banks.** That a federal question is involved in determining the liability of this defendant by reason of the **alleged mismanagement of said bank** and the **alleged** neglect of duty on the part of this defendant."

We undertake to say that plaintiffs in error did not in and by this allegation specially set up in legal and logical form, and claim a federal right, privilege, or immunity of his own, under the "National Banking Act" or under section 709 of the Rev. Stat. of the United States.

All or nearly all that plaintiffs in error attempted to do by this pleading was to set up **what is alleged and set up in the petition.** In other words, plaintiffs in error did not by clear and concise language and with proper and good pleading set up and claim any right of his own, as now set up in the assignments of error appearing in the printed Record No. 230 at pp. 111 to 113, wherein it is now specially set up that the court erred in deciding that section 5239 of the revised statutes of the United States limits or controls the liability of plaintiffs in error for making, attesting and publishing the reports to the Comptroller of the Currency, whereas nothing of the kind was held, decided or passed upon by the state courts, nor was section 5239 even men-

tioned in the motions for a new trial or the answer.

Assignments numbers 6 and 7 are quite alike except that in No. 7 it is now claimed that the decision in this action by the Supreme court of the state is in violation of section 5239 of the revised statutes. But if you turn to the allegations of the answer and the motions for a new trial, it will be seen that plaintiffs in error do not claim or base any federal right under sections 5239 of the revised statutes, nor did they set up or specially plead such a right as belonging to them or either of them, nor did any one of these plaintiffs in error at the proper time or in a proper way make such claim. And what is true as to section 5239 is also true as to section 5211 of the revised statutes now mentioned in assignment No. 9, and section 5234 and section 5236 of the National Banking Act now mentioned in assignment No. 10, together with section 709 of the revised statutes now mentioned in assignment No. 11. Not one made thereunder in the answer, or in the motion for a new trial, and no right, title, privilege, immunity or demand was specially set up or pleaded by any one of these plaintiffs in error, in or under any one of these laws in the trial court, nor can it be fairly said that a direct or positive claim was made under the "National Banking Act." Plaintiffs in error did not in the state court claim any right arising under any such laws either by pleadings; by their evidence; by their instructions to the jury or in the motion for new trial in the trial court.

What the plaintiffs in error did allege by the separate answer of David E. Thompson and by separate and joint answer of Charles E. Yates and Ellis P. Hamer was that the plaintiffs, now defendants in error: the bank; the cred-

itors of the bank; the directors of the bank; the stockholders of the bank, or using the plural number in said answer, "all banks" mentioned in the "National Banking Act," had a federal right, or must perform said duties, under the "National Banking Act," which gave to them the right of removal out of the state court into the federal court or by inference that they had a right, privilege or immunity, under the "National Banking Act" belonging to them; not to plaintiffs in error, and that is the reason why it is alleged in the third, fourth and fifth paragraphs of the first defense in the answer (Record 230) and make use of the following language:

"That the duties and obligations of the directors and stockholders of said bank were such and only such as were required by the National Banking Act, * * * and that if he (plaintiff in error) made, signed or attested any report showing the conditions of said bank for the **purpose and in the manner alleged in plaintiff's amended petition,** it is founded upon the alleged facts which, if true, constitute a violation by these defendants as a director or stockholder of his duties as such director or stockholder as laid down and defined in the National Banking laws of the United States **for any act done or duty neglected as set forth in said amended petition or otherwise. * *"**

Plaintiffs in error made reference to the "National Banking Act" and the "National Banking laws" in the state court for the further reason appearing in the first paragraph of the motion for a new trial.

"First, that said cause of action had been duly and legally removed to the federal court on account of the federal questions involved as shown in plaintiffs' petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause."

It is quite clear from these allegations that plaintiffs in error considered a federal question appeared on the face of the petition, not in themselves but in the bank, the creditors or the stockholders, and therefore the action was removable, and that the duties and obligations of the several "directors and stockholders" reference being made to them under this law, and the right they, or the bank, might have had under a federal law, together with the allegations in the answers referring to plaintiffs' petition, that the action was removable because of the allegations set forth in the amended petition, but the allegation is very uncertain and ambiguous whether any federal right the pleader had was specially and clearly set up or claimed or relied upon in either one of the two answers, as a defense in the action.

It is held by this court that:

"It is well settled that in order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under the United States, that a title or right must be of the plaintiff in error and not of a third person only."

Owings v. Norwood, 5 Cranch 344.

Montgomery v. Hernandes, 12 Wheat 129-132.

Henderson v. Tenn., 10 How. 311.

Hales v. Gaines, 22 How. 144-160.

Long v. Converse, 91 U. S. 105.

Giles v. Little, 134 U. S. 650.

Ludeling v. Chaffee, 143 U. S. 305.

The entire second defense of the answers is concerning a certain judgment claimed to have been obtained in an

action of like title between the same parties in the United States circuit court for the District of Nebraska, wherein a judgment for costs was rendered in the sum of $125.73, and that defendant in error failed and neglected to pay said judgment for costs and that said judgment is a bar to the prosecution of this action. But neither Thompson, Yates or Hamer were even a party to the action of Bailey v. Mosher et al., cited above, and this judgment is not even urged in the brief of plaintiffs in error as against any of deefndants in error, save and except Thomas Bailey. We therefore leave the argument as to the difference btween the cause of action set up in the old petition of Bailey v. Mosher as determined by Caldwell, circuit judge, and the petition in case at bar as determined by Shiras, district judge; Thayer, circuit judge, and the Supreme court of Nebraska.

The third defense is simply an allegation of payment and this court has no jurisdiction over any of the matters alleged in the third defense. The fourth defense (23 Record No. 230) in the answer alleges:

"* * * That if he neglected any duty as such director or stockholder, or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the bank becomes insolvent and gave rise to a cause of action against this defendant sounding in damages, said cause of action existed, if any, in favor of the bank or the receiver of said bank after his appointment, and not in favor of this plaintiff."

So far, then, as to any of the defenses set up in the two answers, not a single word appears in the same complying with section 709 of the revised statutes, specially setting up or making a claim to a federal right, privilege or im-

munity by a plaintiff in error in himself, which this court has jurisdiction to review. There is in the answer some inferences that the Capital National Bank; the receiver of said bank; the directors; the defendants in error or the stockholders had a federal right or claim under the "National Banking Act" or that the cause of action set up in the amended petition under the banking laws of the United States belonged to said bank, or its receiver, but neither said bank or its receiver, or its directors or stockholders being a party to this suit, under the authorities above cited, it has become wholly immaterial as to the allegations concerning any federal right owned or claimed by the defendants in error, the bank, its receiver, its stockholders or its board of directors.

But the fourth defense continues in the allegation that if plaintiffs did deposit their money in said Capital bank as alleged, and the bank then failed and became insolvent, the plaintiffs could not individually recover the said money **from said bank** and said damages when recovered would, under the law, be distributed ratably by said bank, or by the receiver of said bank among the creditors and stockholders of said bank.

This is a clear allegation of a cause of action, or a cause of defense in a third party, to-wit: the bank; its receiver; its creditors or its stockholders. There is no pretense of any right or claim, privilege or immunity, of the plaintiffs in error, under any federal law on behalf of himself in this allegation.

Under section 709, granting jurisdiction to this court of:

"Where any right, title, privilege or immunity is claimed

under the constitution, or any treaty or statute, or commission held, or authority exercised under the United States and the decision is against the title, right, privilege or immunity, specially set up or claimed by either party under such constitution, treaty, statute, commission or authority may be re-examined. * * *"

And this court has held:

"Jurisdiction in such case cannot be inferred argumentatively from averments in the pleadings, but the averments must be positive."

Hamford v. Davies, 163 U. S. 273.

We assert it to be the law of this court, in order to give jurisdiction in this case under section 709, that some right, privilege or immunity of the plaintiffs in error must be specifically pleaded, some federal right or some federal statute, and a distinct and special claim thereunder, in language that is so clear and plain as to show that the plaintiff in error himself, or some one of them, intended to rely upon the same, whereas it is clear and plain from the allegations of the answers that the plaintiffs in error did not make or claim a federal right, privilege or immunity which he insisted upon as his, and under which he claimed and pointed out to the trial court that the federal courts would protect him in such right.

The amended petition appearing on pages 7 to 12 of the printed record need hardly be copied by us at large, but we assert that not one sentence, line or paragraph thereof appears in the whole petition setting up a federal right blonging to the defendants in error whereby the defendants in error were made to rely or claim under or by virtue of

a federal law, and about as strong a part of the petition to aid plaintiffs in error is:

"Plaintiff states that by reason of facts as above set forth and the false and fraudulent statements, advertisements and representations of the defendants the plaintiff has been damaged in the sum of Twenty-Five Thousand ($25,000) Dollars; wherefore plaintiff prays judgment against the defendants and each of them for the sum of Twenty-Five Thousand ($25,000) Dollars, his damages with interest thereon from January 21st, 1893, at 7 per cent and costs of suit."

Perhaps the first, second, third and fourth paragraphs of the motion for a new trial will more clearly set forth the federal right, privilege or immunity claimed by plaintiffs in error than any other concise statement in the record. The same appear on pages 49 and 50 of Record No. 230, and are as follows:

"I. That said cause of action had been duly and legally removed to the federal court on account of the federal questions involved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed with the trial of said cause.

"2. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of this deefndant the plaintiff is not, as a matter of law, entitled to recover.

"3. The damages alleged in the plaintiff's petition, if any existed, on account of the charges made in said petition could only be recovered by the bank or by the receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for itself individually.

"4. The court erred in taking jurisdiction of said case

and the hearing of the proof under the allegations of the plaintiff's petition over the objection of this defendant, for the reason that the duties and liabilities of this defendant as a director of the Capital National Bank are governed and controlled by the National Banking Act, under which said bank was organized, and for which this defendant was acting in the capacity of a director; and the damages growing out of the mismanagement, negligence or fraud of this defendant as charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the National Banking Act and the liabilities of said defendant under said act as a director of said bank."

The above is perhaps as strong a statement as appears in the records and is substantially the only attempt in the trial court to raise a federal right on behalf of plaintiffs in error.

A question of assessment of a national bank is not a federal question.

Williams v. Weaver, 100 U. S. 547.

And so in the case at bar the cause of action set up in the original and in the amended petitions is as old as the common-law itself, the right to a cause of action for fraud and deceit existed long before a federal question, or even our federal government, came into existence. The state court, Shiras, district judge and Thayer, circuit judge, all held that the cause of action stated in the original petition and in the amended petition is one for fraud and deceit, and we feel confident that this court will hesitate long before it will hold that all the defendants in error were endeavoring to accomplish by the cause of action was to establish or collect an asset which belonged and should go

to the receiver of the bank for the benefit of general creditors when they had suffered so severely personally in damages, which asset would have to be equally divided pro rata among hundreds of creditors of the defunct bank, instead, as stated on the face of the petition, to be a claim for individual damages caused by the false and fraudulent representations of the plaintiffs in error.

In Chappell v. Waterworth, 115 U. S. p. 102, this court holds that under the acts of March 3, 1887, and August 13, 1888, a case not dependent on the citizenship of the parties

"Cannot be removed from a state court into the circuit courts of the United States, as one arising under the constitution, laws or treaties of the United States, unless that appeared by the plaintiff's statement of his own claim, and if it does not so appear, the want cannot be supplied by any statement in the petition of removal or in the subsequent pleadings."

In Tennessee v. Union & Planters Bank, 152 U. S. 454, this court in an exhaustive opinion by Mr. Justice Gray held, that the jurisdiction of the circuit courts, either original or upon removal, "must appear at the outset from the declaration or bill of the party suing that the suit is of that character."

The petition in the case of Oregon Short Line Ry. v. Kottowe, 162 U. S. 490, alleged as much of a federal question, perhaps more so, than does the petition at bar, but the court held that under Tennessee v. Union & Planters Bank and Chappell v. Waterworth that the cause of action stated in the petition was really one of negligence, while in the case at bar it is one of negligence and of fraud and deceit.

We venture the assertion that not one positive or special averment, allegation or paragraph can be quoted from the petition of defendants in error, or from the separate answer of plaintiffs in error, wherein or whereby it is alleged, set up, claimed or relied upon a federal law, or a federal right of any kind by either one of the parties hereto. It so happened that the defendants were pretending to and were carrying on a national bank created under the laws of the United States and some of the defendants were directors, some managers and some officers of the bank, but all of them induced defendants in error to believe that the bank was a safe and sound institution wherein to place his money, and the reports of the condition of the bank to the Comptroller of the Currency showing the good standing of the bank, were published in the local newspapers, seen and read by plaintiffs who relied upon and believed said published statements and verbal representations to be true, whereas said bank was insolvent from the very day it was organized as a national bank and until its doors were closed in bankruptcy, and it is the hope of plaintiffs in error that these mere references to the "National Banking Act" will now be taken as a positive allegation and claim of a federal right of plaintiffs in error.

In charging fraud in pleadings under the state law, the petition must state facts, not conclusions, hence it is from inferences, conclusions and forced construction to be placed upon the petition, as well as the separate answer, that plaintiff in error hopes to have the court meet with his views.

This court is bound by the findings of the trial court which were sustained by the Supreme court of the state,

and they are conclusive and binding upon this court. We quote from Egard v. Hart, 165 U. S. on p. 191 from the opinion in the case of Mr. Justice White:

"It is clear if these questions of fact are adequate to determine the controversy between the parties and broad enough to maintain the judgment, independent of any federal question, then we are without jurisdicition although the state court may have also decided such a question. Eustus v. Bollies, 150 U. S. 361. N. Y. Railroad v. Woodruff, 153 U. S. 689. Hammond v. L. Ins. Co., 150 U. S. 633."

The case at bar is largely like the case of Zadig v. Baldwin, 166 U. S. 485, and the same order should be made herein, as in that case.

But the words of the statute demands that plaintiff in his petition **"must specifically plead some federal right in language so that it is plain and clear that plaintiff himself intended to rely on the federal law.'**

No one, so it seems to us, can successfully point out that plaintiffs in error intended by their answer or that defendants in error intended to set up by the petition a right, privilege or immunity under a federal law. The petition rings with fraud and deceit, with false representations, with reliances by defendants in error upon such fraudulent statements and that plaintiffs believed them to be true and a claim that because of such fraud he was damaged in the amount named in the prayer to the petition. While the answer alleges the right of defendant in error, the board of directors; the stockholders; the bank or the receiver of the bank and of the cause of action set up in the petition of "banks' generally, named in the "National Banking Act." Not a national statute, law or constitution, section or para-

graph thereof is "specially set up" or "specially pleaded" or relied upon or a claim made thereunder by the defendants or plaintiffs in error, either in the petition or the answer, and it is only by a forced construction or by a wild inference that plaintiffs in error can see some federal right that they think defendants in error; the bank; the receiver or the bank; the stockholders or the "banks" named in the "National Banking laws" intended to or should be compelled to rely upon.

In Oxley Stave Co. v. Butler, 166 U. S. 648, the syllabus in that case is as follows:

"This court cannot review the final judgment of the highest court of the state even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was "specially set up or claimed" in the state court as belonging to such party under the constitution or some treaty, statute, commission or authority of the United States, revised statutes 709.

"The words 'specially set up or claimed' in that section imply if a party in a suit in a state court intends to invoke for the protection of his rights the constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare, and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. **This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference.**"

In Levy v. Superior Court of San Francisco, 167 U. S. p. 175.

The syllabus to the case is as follows:

"Oxley Stave Co. v. Butler County, 166 U. S. 648, fol-

lowed to the point that "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from inference but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right.

"A definite issue in respect to the possession of the federal right must appear and be distinctly deducible from the record."

Muse v. Arlington Company, 168 U. S. 430.

The writ of error was dismissed in this case on quite similar grounds as stated in last authority.

In Mutual Life Ins. Co. v. Kirdoff, 169 U. S. 103, the last part of the syllabus is as follows:

"Oxley Stave Co. v. Butler Co., 166 U. S. 648, cited, quoted from and approved to the point that the words 'specially set up or claimed,' in Rev. Stat. 709, imply that if a party in a suit in a state court intends to invoke for the protection of his rights, the constitution of the United States, he must so declare, and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court."

In the case of Kipley v. Illinois, 170 U. S. p. 182, Mr. Justice Harlan held as follows:

"When the jurisdiction of this court is invoked for protection against the final judgment of the highest court of a state of some title, right, privilege or immunity secured by the constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was specially 'set up or claimed' under such constitution or laws, as the jurisdiction of this court cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a federal right."

Chief Justice Fuller in the Western Union Telegraph Company v. Ann Arbor Railroad Company, 178 U. S. p 239, held as follows:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the constitution and laws; and it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends upon the construction of the constitution, or some law or treaty of the United States, before the jurisdicition can be maintained on this ground."

In the case at bar the plaintiffs in error as well as defendants in error did not specially plead, set up or claim under any right at all under any special law or statute of the United States, neither was there an issue raised by and between any allegation in the petition and the answer of plaintiffs in error, or by the reply, as to any federal right, privilege or immunity, or claim of right by either of the parties to this action.

The only federal right that can be deduced by inference in these premises is the reiterated claim of plaintiff in error that defendant in error does of necessity make such claim, by the petition, but from the beginning of this action up to the present time defendants in error have made a clear, positive and distinct claim and allegation of fraud and deceit; has successfully proved the same; has recovered a judgment for the same; has succeeded in obtaining the judgment of Shiras, district judge, and Thayer, circuit

judge, together with both the trial court and the Supreme court of the state, holding plaintiffs in error liable for fraud, and nothing but fraud, under the petition and the general laws of the state of Nebraska.

Again nothing in the record shows more clearly that the damages sought to be recovered by the petition are not the assets referred to or the cause of action arising under any one of the several sections of the "National Banking Act" than does the evidence in this case, and to illustrate this more clearly take the evidence of H. T. Jones, the cashier and managing officer of the Jones National Bank, who, on p. 191 of the bill of exceptions, says:

"Q. Was the Capital National Bank of Lincoln your correspondent, as it is termed in banking? A. Yes, sir. Q. Do you know the amount of money the Jones National Bank had on deposit with the Capital National Bank and which the Capital National Bank was owing the Jones National Bank on the 21st day of January, 1893? A. Our books showed $12,529.23, but the facts were, that they were owing us $17,529.23 on account of a $5,000 remittance I had ordered them to make, and sent them the money, and they reported to me that they had, but they never did. Q. What was the remittance you ordered them to make? A. $5,000 to the Chemical National Bank of New York City. Q. And did the Capital National Bank report to you that that amount had been remitted to the Chemical National Bank for the Jones National Bank? A. It did on the 16th day of January, 1893. Q. I hand you exhibit No. 1054 and will ask you from whom that was received and where you received it? A. It was received in the regular course of business, by mail, from

the Capital National Bank, a postal card in the handwriting of Colonel Hale. Q. What does the writing on this postal card indicate, what does it mean? A. That they have remitted for our account, New York, $5,000. Q. Is that the item to which you referred in your previous answers, the one which you had ordered transferred to the Chemical National and which the Capital National had not remitted? A. It is. Q. And does that item account for the difference betwe en the amount as shown on your books, which they owed you, and the amount which they actually owed you? A. It does. Q. At the time you ordered this money forwarded or transferred by the Capital National Bank to the Chemical National Bank, did you give the Capital National Bank of Lincoln credit on your books for the $5,000? A. Yes, sir.

Mr. Thomas: We offer in evidence exhibit No. 1054. . . . No objections.

Exhibit No. 1054 received and read in evidence as follows:

Addressed: Jones National Bank, Seward, Nebraska.

(Lincoln, Nebr., Jan. 17, 1:30 a. m., '93)

C. W. Mosher, President; H. J. Walsh, Vice-President; R. C. Outcalt, Cashier.

CAPITAL NATIONAL BANK.

Lincoln, Nebraska, 1-16, 1893.

Yours of.....Received with enclosures as stated.

Credited.....Entered for collection.....We remit.

1009

New York $5,000
Chicago
Omaha
Currency
Silver

Ex. 1054, OPH.

This bank in receiving collections elsewhere than in Lin-

coln acts only as your agent and assumes no responsibility beyond that of due diligence on its part.

Yours respectfully,

R. C. OUTCALT, Cashier.

The court will please understand that this postal card, exhibit No. 1054, was simply a false representation made by the Capital Bank in order to obtain the $5,000 from the Jones Bank. The Capital Bank did not remit said $5,000 to (The Chemical National Bank) New York, as falsely stated "we remit $5,000, New York." This money was obtained by the Capital Bank after years of business establishing a splendid credit with the Jones Bank, but the money was obtained in no real different manner than had a burglar entered the Jones Bank with jimmy and dynamite. The receiver of the Capital Bank, or the Capital Bank, as alleged in the answer in this case, would have no cause of action for this $5,000, to be recovered by the Capital Bank under the "National Banking Act" as an asset to be distributed pro rata among all creditors of the Capital Bank. If the Jones Bank can only have its pro rata share distributed to it for this 5,000 it would only be adding insult to injury and the bare statement of facts as shown by this evidence clearly shows that the cause of action set up in the petition is for fraud and deceit and is not, cannot be, for assets wrongfully diverted from and belonging to said Capital Bank. This item of $5,000 never was nor could it ever become an asset of the Capital Bank.

The date of this postal card is January 16th, 1893. The bank is said to have failed on January 21st, but the 21st was Monday when it failed to open its doors,, so that in fact it really failed on Saturday, January 19th. The card is dated

the 16th. It was stamped by and reached the U. S. post-office on the 17th at Lincoln, Nebr., at 1:30 a. m. So that it was impossible for it to reach Seward until late on the 17th or early on the 18th, which was Friday, the day before the bank in fact failed. In other words, the Jones Bank was swindled out of $5,000 by means of this P. O. card and the money so obtained ran this bank Saturday, otherwise it would have closed its doors on Friday the 18th. Can it be possible that such a claim for damages belongs to the bank or the receiver or the general creditors or the stockholders of the Capital Bank, and that the National Banking Act has destroyed and taken away the right of the Jones Bank to recover such a damage in an action for fraud and deceit? The Capital Bank was not damaged, it simply received $5,000 by the fraud of plaintiffs in error.

But let us go to the evidence of Thomas Bailey for one more illustration of whether the damages named in the petition belong to the Capital Bank, its receiver or the general creditors of the bank.

On p. 173, Bill Ex., Mr. Bailey says:

"Q. Tell what your transaction was? A. In the first place I went to the bank to see what interest they were paying before I took this out. I received notice from the First National Bank that they wouldn't only give me 5 per cent interest, and I thought this Capital National Bank was as good as the First, and they offered me 6, and the consequence was I just signed the certificate of deposit over to them and they gave me their certificate for it. Q. Have you any memorandum by which you can refresh your memory? A. October 11th, 1892. Q. Well, how much was that? A. Ten thousand dollars I deposited there that

day. Q. And when did you have any other transaction with the bank with reference to the matters involved in this suit, if any? A. Well, I deposited some more in December 28th, 1892. Q. How much? A. I think it was $2,000. I don't remember the exact amount. Q. Now how many transactions did you have with the bank? A. I think that about all that I can remember. I drew five hundred dollars out January 19th, 1893. Q. Well, now you may state how you came to do business with the Capital National Bank instead of the First National Bank. A. The reason was the First National only wanted to give me 5 per cent on my money and I went down to the Capital National Bank and they offered me 6. Q. How did you come to go to the Capital National Bank? A. I went on purpose to see what they would pay on the money and I thought it was just as good as the First National. Q. What information did you have as to the condition of the Capital National Bank? A. As soon as I went in they handed me a card and the directors and stockholders of the bank were on that card and I took the papers several years previous. Q. What papers? A. The Semi-Weekly Journal, I believe, and the Call. Q. State what you saw in them if anything? A. I supposed it was as good as I could do. Q. What did you see? A. I saw that the bank was in pretty good circumstances, as I supposed the way the amount of assets read in the published statements. Q. You say they gave you a card of the bank on which the officers' names and directors appeared? A. Yes as soon as I came into the bank and told them I had some money, I had in the First National Bank, and they offered me 6 per cent and I thought they were just as good as the other and I

thought I would like it. Q. State when it was with reference to time? A. I suppose ever since the bank started, for I read the papers every day and took particular notice. I had some money to loan out and I took a little notice where I thought was the best place to put it. Q. And what reliance did you make, if any, upon these statements? A. Well that was all the reliance I had was what I could get information in the papers in regard to the standing of the bank. Q. State what information, if any, you had other than what was disclosed in the statements that were published. A. That is all the information I had. Then I knew some of the officers and I thought they were good business men. Q. You knew some of the directors? A. Yes, sir. Q. What ones? A. I knowed Walsh. Q. And did you know any of the others? A. I knowed two or three of them personally. I knowed Mr. Mosher and Outcalt and I knowed Mr. Stuart well. Q. And did you know who were the directors of the bank as shown by the advertisements and card? A. I knowed the balance by reputation. Q. Well, who were they? A. They had Stuart, Holmes, Mr. Thompson, Hamer, Phillips, Yates and Mr. Mosher and Outcalt was cashier. I have known him ever since he has been in the state. I did business with him when Sweet & Brock were running a business there. Q. You may state, Mr. Bailey, if you know anything about the condition of the bank except as was disclosed by the published statements?. You may state where you got your information as to the condition of the bank A. I got it out of the published statements. Q. And from any other source? A. No, sir, I had no other source to get it from. Q. You may state, Mr. Bailey, whether or not you would have deposited

your money and transacted your business there at this bank except upon the statements that you had seen and read. State what inducements were made and all of them that were made in order to induce you to transact your business with this bank? A. The inducement was that they would give me 1 per cent more than the First National Bank, and I thought it was just as good as where I had it, and I was getting more interest on my money. Q. Was that all that induced you to transact your business there, or was there any statements made? A. All the statements that was made I read in the papers. Q. Now, which did you rely upon, the—You may state what effect those published statements had upon your transacting business with the Capital National Bank, if any? A. Why, that is all the effect; all I had to go by was the published statement, supposing it to be true and correct. Q. Did you believe it to be true? A. I believed it to be true or I would not have put my money there. I would have kept it where it was. Q. How did you know now the reputation of these directors? A. Well, I had heard they was good men; I knowed some of them to be good business men. Q. Men of wealth and business sagacity? A. Men of wealth, yes sir.'

Kindly remember that this bank failed and closed its doors in fact on January 19th. On October 11th, just 100 days prior to the inducements offered to him as above shown to take his $10,000 out of the First National Bank and put the same in the Capital Bank. On December 28, just twenty-two days prior to the collapse, he placed $2,000 more in this bank, believing it to be a safe place to put his money. We have shown by our briefs here on file that the Capital Bank was never solvent. That from the very day

it was organized as the Capital National Bank to the 19th day of January, A. D. 1893, it was a bankrupt. This occurred on October 11th, just 100 days prior to its closing its doors as a business house, a period from May, 1884 (Bill p. 61) to January 19th, 1893, every hour of which the managing officers of this bank had actual knowledge and every director and officer either well knew or ought to have known that said bank on October 11th, 1902, should not entrap Mr. Bailey into withdrawing his money from the First National Bank and place it where they knew it could never be repaid, did not plaintiffs in error thereby create the cause of action set forth in the amended petition, or did they create a cause of action in the Capital Bank, under federal law, or is it a cause of action personal to Mr. Bailey?

Can it be possible that it is law, justice or right that Mr. Bailey has by virtue of the "National Banking Act" lost his right to a personal action in a state court to recover this money, for so palpable fraud as this? That the old action at common-law for fraud and deceit is abolished in state courts; and the "National Banking Act" is an inhibition and prohibition on the very jurisdiction of state courts in actions of this kind?

Section 5239 (Rev. Stat. U. S.) is not alleged or set up by Thompson or by Yates and Hamer in their separate answers. In general terms it might be included in the right of the third parties alleged under the "Banking laws of the United States" and "The National Banking Act," and the "National Banking laws." They did not mention it in their motion for a new trial in the trial court (p. 43-49-50-51 and 52 Tr.), neither did they

claim any right under section 5239 now so earnestly set up in the brief of Mr. Thompson, nor did they mention it in their instructions to the jury, or in a petition in error in the Supreme court of the state. What they did claim was that defendants in error had or stated such a right in defendant error by the allegations of the petition.

In the case of King v. McLean, Asylum, 12 C. C. A. p. 139, the court held:

"A petition for habeas corpus which merely alleged that the petitioner is restrained in violation of the constitution and laws of the United States and is illegally imprisoned without due process of law, but does not set out in detail anything touched by the federal laws or constitution, does not state facts giving the circuit court jurisdiction."

Whittmore v. Bank, 134 U. S. 527; 10 Sup. Ct. 592, was an action commenced in the United States court for the District of NewHampshire by a stockholder for himself and such other as might join, against the directors, cashier and ex-director of a national bank to compel them to pay money lost to the bank by reason of their illegal conduct, charging them with doing acts **"in doing which the directors and officers violated their duties and obligations to the bank's stockholders, and their acts were in violation of the charter of the bank and the laws of the United States"** and it was claimed by counsel in that action, same as the one at bar, that the circuit court had jurisdiction under sections 5209 and 5239 of the revised statutes.

This court dismissed the bill for want of jurisdiction in the circuit court.

The syllabus is as follows:

"Under act of Congress July 12, 1882, providing that the

jurisdiction for suits by or against any association established under any law providing for national banking associations, except suits between them and the United States, shall be the same as the jurisdiction for suits by or against banks not organized under any law of the United States, the circuit court of the United States has no jurisdiction of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment to the bank by the directors of sums lost by reason of their illegal conduct.

"Nor is such jurisdiction conferred by Rev. Stat. of United States, 5209, prescribing punishment for embezzlement or wilfull misapplication of the funds or credits of a national banking association by its officers or directors; nor by 5239, providing for a suit by the Comptroller of the Currency to forfeit the franchises of national banks for the intentional violation by their directors of the law relating to national banks."

Neither did plaintiffs in error mention Sec. 5239 of the revised statutes of the United States in their instructions offered to the trial court, nor did they lay a proper foundation at the proper time and place in this action for any such right now so earnestly set up in the brief filed herein signed by Mr. Deweese and Mr. Bishop.

The ninth instruction printed on p. 5 of said brief was not offered by Mr. Thompson (p. 30 Record No. 230), but by defendants in error, and by Mr. Thompson duly excepted to. Certainly they cannot in this manner raise a federal question or build up a right or immunity to have this court review the same in this court. He must offer an instruction of his own and the court must refuse him some federal right mentioned therein. That part of the separate answer of Mr. Thompson, printed on pp.5 and 6 of his brief, does not set up, nor did Mr. Thompson at the trial claim a right

under section 5239 of Rev. Stat. U. S. The separate answer of Thompson simply alleges the names of the officers of the Capital Bank; that it was closed by the Comptroller; that no forfeiture of the franchise of the Bank has ever been declared; that the duties and obligations of the directors and stockholders of the bank were such and only such as required by the "National Banking Act," and a denial that he signed the reports **in manner as alleged in the amended petition.** * That the cause of action set out in the amended petition, if any, is founded on the alleged facts which, if true, constitute a violation of this defendant as a director or stockholder of his duties as laid down and defined in **the "National Banking Laws of the United States,"** to-wit:

"Concerning the government and management of National Banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the National Banking Act concerning the management of National Banks; and that in determining the liability of this defendant, there is necessarily involved the construction of said National Banking Act relating to the **duties of directors and stockholders of National Banks."**

But this is not claiming a federal right, privilege or immunity in Thompson. It is claiming one, if any, in the directors or stockholders of the several banks of the United States, or of its receiver, or in the defendants in error. It is not, was not a personal claim by Thompson of such a claim to the trial court. The trial court had no notice of any such claim on behalf of Mr. Thompson. At that time

he did not make the claims, or rely thereon, he now makes in his assignment of errors in his brief on pp. 14 to 16. The brief does not comply with the rules of this court and plainly refer to the record where he made such claim in the state courts and specially in the trial court. Take assignment No. 11 (p. 112, Record 230) as an illustration of the manner Thompson even in this court makes his assignment of error.

"* * * And the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done in violation of section 709 of the revised statutes of the United States."

We venture the assertion that Mr. Thompson, nor any of the plaintiffs in error, did not in this whole record assert or make claim to a single federal right, privilege or immunity as belonging to him to which he can now refer the court, that involves a right claimed by himself under section 709 of the revised statutes of the United States, nor did he by clear and direct claim specially assert such federal right under the "National Banking Act" unless the court will now hold that a general reference to the whole of the "National Banking Laws" is sufficient, and unless the court will hold that Mr. Thompson can set up a right in some third party and in some manner draw from the said third party's right such a right to himself.

But the assignments of error in the case at bar only relate to errors of the Supreme court of Nebraska, not to errors relating to some federal right properly set up or claimed in the trial court. We deem this very important, for in Miller v. Texas, 153 U. S. 538, Mr. Justice Brown said:

"And if the Fourteenth amendment limited the power of the states as to such rights as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. In Spies v. Illinois, 123 U S. 131, 181, objection was made that a certain letter was obtained from the deefndant by an unlawful seizure and the constitutional immunity was set up in the Supreme court of Illinois as well as in this court, but it was not made on the trial in the court of original jurisdiction. It was held, both by the Supreme court of Illinois and by this court, that the defense should have proven that the letter was unlawfully seized by the police and should then have opposed its admission upon the ground that it was obtained by such unlawful seizure. Said the chief justice: 'As the Supreme court of the state was reviewing the decision of the trial court it must appear that the claim was made in that court, because the Supreme court was only authorized to review the judgment for errors committed there and we can do no more. * * * If the right was not set up or claimed in the proper court below the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned.' So in Texas Pacific Railway v. Southern Pacific Co., 137 U. S. 48, it was held directly that a privilege or immunity under the constitution of the United States cannot be set up here under revised statutes (sec. 709) when suggested for the first time in a petition for rehearing after judgment. See also Caldwell v. Texas, 137 U. S. 692, 698."

Section 709 is not even mentioned in the answer, nor in any one of the numerous instructions offered by the defendant in error, or those offered by the court upon its own motion (27 to 36, record No. 230) nor in the instructions offered by Thompson (37 to 44 record No. 230) Section 5136 of the National Banking act is mentioned on p. 38, Record No. 230, which section relates principally to the creating of National Banks; **and this is the only particular reference made by Thompson or any other plaintiff in error** in the instructions to the jury, so that in all instructions

offered by all defendants not one of them specially claimed, set up, or then intended to rely upon a federal right, or bring his case to this court for final adjudication of such a right. Again it should be remembered that separate answers were filed by each defendant. No joint answer of a plaintiff in error, now in this court, was filed save and except Yates and Hamer (21-24, Record No. 230). Each defendant, now plaintiffs in error, stood squarely on his personal and individual right, and yet only in a few instances, and in no instance did any one defendant (37 to 44, Record No. 230) request the trial court to instruct the jury as to his separate federal right, privilege or immunity, under his answer, and not a single defendant requested a separate instruction setting up or claiming a federal right under any federal statute or any federal law, not even the "National Banking Act," and we here assert in the very language of many opinions in this court that:

"* * * It must appear that the claim was made in the court of original jurisdiction, because the Supreme court was only authorized to review the judgment for errors committed there, and we can do no more, and if the right was not set up or claimed **in the proper court below**, the judgment of the highest court of the state in the action is conclusive so far as the right to review here is concerned."

It is the law of Nebraska, well settled by a long line of decisions that the Supreme court can only review the errors alleged in the motion for a new trial and if no motion for a new trial is made within three days of the verdict all errors are waived. And it should be remembered that the only jurisdiction the Supreme court of Nebraska had in this action was to review the errors alleged in the motion for

a new trial and in turn alleged in a petition in error filed in the Supreme court.

Sec. 314, Code Civil Procedure Nebraska.

Sec. 315, Code Civil Procedure Nebraska.

McDonald v. McAllister, 32 Nebr. 514.

Nebraska Nat'l Bank v. Pennock, 59 Nebr. 61.

Sec. 584,Code Civil Procedure Nebraska.

Courtnay v. Price, 12 Nebr. 182.

R. V. R. R. Co. v. Mayes, 13 Nebr. 491.

Singer v. Doggett, 16 Nebr. 609.

Dunham v. Courtney, 24 Nebr. 629.

Cunningham v. Tonnemaker, 13 Nebr. 462.

Weir v. B. & M. R. R. Co., 19 Nebr. 215.

Moore v. McCallum, 43 Nebr. 617.

The mere reference to a federal right claimed by defendants in the first paragraph of the motion for a new trial (p. 49, Record No. 230) which only relates to the removal of the cause to the federal court, which alleged error, if any there was, plaintiff in error now waives, and does not urge said error to this court.

The third error alleged in the motion (p. 50, Record No. 230) that if any damage existed as alleged in the petition "could only be recovered by the bank or by the receiver, and ratably distributed among all the creditors and stockholders of said bank and could not be recovered by plaintiff for itself individually," is not material here for we have shown that this is no more or less than setting up a federal right, in either one of four parties named, entirely outside

of this action, namely: First, the bank; second, the receiver of the bank; third, the stockholders; fourth, the creditors of the bank, and such federal right if one really existed in favor of said four parties, can give this court no jurisdiction in favor of plaintiffs in error.

The only remaining error alleged in said motion for a new trial that makes any reference to a federal law, is the fourth paragraph thereof:

"4th. The court erred in taking jurisdiction of said case and the hearing of the proof under the allegations of the plaintiff's petition over the objection of this defendant for the reason that the duties and liabilities of this defendant as a director of the Capital National Bank are governed and controlled by the National Banking Act, under which said bank was organized and for which this defendant was acting in the capacity of a director, and the damages growing out of the mismanagement, negligence or fraud of this defendant, as charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the National Banking Act and the liabilities of said defendant under said act as a director of said bank."

This objection is very general in its scope and gives the triel court no notice of what the specific error alleged is, and would require the trial court to stop proceedings in his court and take the time to examine the whole "National Banking Act" and every law that the Congress of another nation has passed relative to the negligence or fraud and the liabilities of directors of National Banks. This is too general even under the state law.

But defendants in the motion urged that these damages would not accrue to plaintiffs, but to one or all of the four parties just named. That is the cause of action, if any exists, in favor of said four parties, or one of them. Therefore, plaintiff had no cause of action, and because one of

these four parties had the right to such damages under the federal law, and such federal right existed in them, and therefore this court now has jurisdiction to so determine. Not that any right can be granted defendants in the motion. Only a right can be determined that belongs to one of these four parties and in this manner this court can acquire jurisdiction. But the last few words do say "the liability of defendant under said act as director of said bank." But such a closing to a whole paragraph in a motion for a new trial, referring in the most general terms both to his "liability" and to a whole "National Banking Act," not whereby or wherein, or in what manner the liability so generally expressed was controlled, when all of the damages, as alleged in the motion for a new trial must go and belonged to one of said four parties, shows clearly that this part of the motion for a new trial is clearly insufficient.

The four paragraphs, first, second, third and fourth, are the only ones in the whole motion for a new trial that make a reference to a federal right, privilege or immunity in either one of the plaintiffs in error, and it is clear that a federal right belonging to any one of them, save and except the claim of removal of the action to the circuit court, were not properly, clearly and specifically raised at the proper time and in the proper way.

But this is not all. The case of Schuyler National Bank v. Bollong, 150 U. S. 85, is quite in point. Bolling brought a suit in a state court of Nebraska against the bank squarely under the statutes of the United States and squarely under a particular section of the "National Banking Act.' The bank, by motion, denied the jurisdiction to try the case and alleged "that exclusive jurisdicition is

by the laws of the United States, to-wit: section 711 of the revised statutes of the United States, vested in the courts of the United States to try and determine the above entitled action."

The whole proceedings in said action at large appears at pp. 85, 86 and 87, and the bank in that case made precisely the same attempt and allegations of record that plaintiffs in error have in the case at bar, but in the opinion it is among other things said:

"But by the requirements to the exercise of our jurisdiction of section 709 of the revised statutes, the title, right, privilege, or immunity thus relied on must be specially set up or claimed in the state court at the proper time and in the proper way. The decision must be against the title, right, privilege, or immunity so set up or claimed. Spies v. Illinois, 123 U. S. 131; Brooks v. Missouri, 124 U. S. 394; Chappell v. Bradshaw, 128 U. S. 132; Texas & Pacific Railway v. Southern Pacific Co., 137 U. S. 48. Yet it is urged that the bank had contended at every stage of the litigation **that the trial court had no power to proceed to judgment against it under sections 5197 and 5198, because of the want of averment in the petition of facts essential to give such jurisdiction, and hence that the bank must be held to have specially set up or claimed the title, right, privilege, or immunity under said sections to be exempt from liability to the plaintiff below for any matter or thing alleged in his complaint.** But we are unable to accede to this view. The case was necessarily tried in accordance with the procedure and practice prescribed by the Code of Civil Procedure of Nebraska. That provided a form of action to be called a civil action, and to be commenced by the filing of a petition and the issue of summons thereon; what the petition must contain; that the pleadings should be liberally construed; that redundant matter might be stricken out and the allegations of a pleading required to be made definite and certain by amendment when necessary; that neither presumptions of law nor matters of which judicial notice is taken need be stated in the pleading; that amendments

in furtherance of justice might be made before or after judgment; that the court should disregard errors or defects in the pleadings or proceedings not affecting the substantial rights of the adverse party, and that by reason of such error or defect no judgment should be reversed or affected; for the assignment of grounds for a new trial, including that the verdict, report, or decision was not sustained by sufficient evidence, or was contrary to law, and for error of law occurring at the trial and excepted to. Par. 2, 62; 92; 121; 125; 136; 144; 145; 314; Comp. Stat. Neb. 1887, pp. 741, 748, 753, 756, 758, 759, 779.

"The questions raised upon the pleadings were disposed of by the Supreme court in accordance with these provisions and the jurisprudence of the state in that regard, and there is nothing whatever to indicate that in passing upon the technical sufficiency of the complaint its attention was invited to the proposition that by its judgment thereon it might be depriving the defendant below of some title, right, privilege, or immunity arising in virtue of the sections under which the liability accrued."

In Eustise v. Bolles, 150 U. S. 362, this court says:

"To give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or constittuion, or that the judgment as rendered could not have been given without deciding it.

"Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment.

"When this court, in a case brought here by writ of error to a state court, finds it unnecessary to decide any federal question, its logical course is to dismiss the writ of error."

See also Baldwin v. Kansas, 129 U. S. 52.

Brown v. Mass., 144 U. S. 573-580.

And in Chappell v. Bradshaw, 128 U. S. 134, the court says:

"As the Supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme court was only authorized to review the judgment for errors committed there, and we can do no more" Tested by this well settled rule it is apparent that this writ of error cannot be maintained, as it is conceded that the plaintiff in error did not set up or claim in the trial court the limitation, the benefit of which he now insists should have been accorded him.

In Brooks v. Missouri, 124 U. S. 394, 400, all through the opinion it is held, that in order to give this court jurisdiction the plaintiffs in error must have laid a proper foundation "at the proper time and in the proper way" and as the Supreme court of Nebraska was reviewing the decision of the trial court, it must appear that the right, title, privilege or immunity was made in the trial court. On p. 399 the general objection was made that a statute of the state was in "violation of * * * the constitution of the United States, nor shall any state deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction the equal protection of the laws," but the state court held the statute valid and on p. 400 this court in the opinion says:

"It thus appears that, while upholding the statute, the court also put its decision on another ground which was equally conclusive against the defendant, to-wit, that even if the trial court could, in its discretion, allow the additional reason for a new trial to be presented after the expiration of the four days, there had been no such abuse of that dis-

cretion in this case as would justify a reversal of the judgment on that account. That part of the decision is certainly not repugnant to any provision of the constitution or laws of the United States, and it is of itself conclusive. It was fairly presented and necessarily involved in the case. It disposed of the supposed constitutional question presented in the argument without a direct decision, upon a ground which cannot be reviewed by us, and which was not evasive merely, but real. Chouteau v. Gibson, 111 U. S. 200; Adams County v. Burlington & Missouri Railroad, 112 U. S. 123, 126, 127; Chapman v. Goodnow, 123 U. S. 540, 548. Such being the case, the decision of the alleged federal question was not necessary to the judgment rendered and consequently is not sufficient to give us jurisdiction. Murdock v. Memphis, 20 Wall. 590, 636."

In Morrison v. Watson, 154 U. S. 115, the court says:

"If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the state; it cannot be asserted in this court. Rev. Stat., see 709; Spies v. Illinois, 123 U. S. 131, 181; Schuyler 153 U. S. 535."

Third Point.

The second defense set up a certain action commenced in the district court of Lancaster county by one Thomas Bailey v. Charles W. Mosher et al. See Bill Exceptions 253-274. While the present action was commenced in the district court of Seward county. On pp. 256, 258 and 270 of the bill all the names of parties to that suit appear in full. Neither David E. Thompson or the Jones National Bank were parties plaintiff or defendant in said action, and plaintiff in error cannot base a federal right belonging to him, and how Mr. Thompson can claim a federal right upon this judgment, as against the Jones National Bank,

is beyond our comprehension. He did not even assign this as error and is therefore concluded (Record No. 230, 101 to 104). But still that is not enough:

"The fact that a suit is brought to recover the amount of a judgment of a court of the United States does not, of itself, make it a suit arising under the constitution and laws of the United States."

Metcalf v. Watertown, 128 U. S. 587.

See large number cases cited under this case in Russell and Winslow syllabus digest, p. 2620.

The cause of action set up in the amended petition by Thomas Bailey (p. 7, Record No. 232) is not like the petition set up in the plea in bar. This is clearly shown by the opinion of Shiras, J., in Bailey v. Mosher et al., 74 Fed. 125, and by Thayer, J., in 107 Fed. 561. If the cause of action in the first petition was one in, and belonged to the receiver of the bank, and the cause of action in the petition at bar is one for damages for fraud and deceit at common-law, then there is nothing in the plea in bar because both petitions are not for personal damages caused, and belonging to Thomas Bailey, and if this court should adopt the same construction placed upon the petition at bar as placed thereon by Shiras, J., Thayer, J., and the state courts, in this record, then the motions to dismiss or affirm filed in each of these several cases should be sustained.

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